authority without the need for the FCC to intervene or otherwise act on this matter,"and requesting that the FCC work with the State commissions, "preferably by referral to a federal-state joint board, to consider under what circumstances and through what mechanisms [ISP] traffic may be treated as interstate, intrastate or jurisdictionally mixed." *Reciprocal Compensation For Calls to ISPs*, at 2 (July 27, 1998). 47 U.S.C.A. § 410 is the statute which authorizes, and in certain circumstances mandates, that the FCC confer and hold joint hearings with State commissions having regulatory jurisdiction with respect to carriers subject to the jurisdiction of such State commissions and the FCC.

However, while the FCC's consideration of this issue has, likely wisely, been deliberate and cautious, more immediate business decisions have had to be resolved. That is in fact what has happened in the case at bar. Just as the pressures of such business decisions should not be used to leverage the FCC to a premature change of position with regard to the nature of Internet Services, the FCC's deliberate pace in allowing the big picture to develop should not force all business decisions to wait. For this reason, stay of this matter while it is referred to the FCC is unwarranted and inappropriate and inequitable to the party who has claimed payment under an existing agreement.

5. **Uniformity Regarding Reciprocal Compensation Is Not Important In View Of The Goal Of Encouraging Competition In The Local Telecommunications Market**

BellSouth contends that it is important for this issue of reciprocal compensation to be decided with uniformity. Certainly, achieving uniformity, where that is the congressional objective, is a concern of the primary jurisdiction doctrine. As the United States Supreme Court noted in *Nader* *v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-304, 96 S. Ct. 1978, 1986-87, 48 L. Ed. 2d. 643, 654-55 (1976):

> Even when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common-law liability, it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency" or where
>
> "the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

However,

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western Pac. R. Co.,352 U.S. 59, 64, 77 S. Ct. 161, 165, 1 L. Ed. 2d. 126, 132 (1956). Therefore, for example, the *Nader* Court concluded that in that case, in which the petitioner sought damages for the failure of the airline to disclose its overbooking practices, "considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board." *Nader*, 426 U.S. at 304, 96 S. Ct. at 1987, 48 L. Ed. 2d. at 655:

> The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically] expert body is not likely to be helpful in the application of these standards to the facts of this case.

Id., 426 U.S. at 305-306, 96 S. Ct. at 1987-88, 48 L. Ed. 2d. at 656.

Likewise, the need for uniformity and agency expertise is not present in this case. Congress is deliberately moving local service away from price regulation and toward competition. This is a primary goal of the Telecommunications Act. In this context, it mandated that the parties negotiate interconnection agreements with one another, but has not dictated the *terms* of those agreements.

While LECs are required to work out reciprocal compensation agreements with one another, the precise form of those agreements is not required to be uniform. Under the Telecommunications Act all LECs have, among other duties, "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C.A. § 251(b)(5). Furthermore, "each incumbent local exchange carrier has . . . [t]he duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection." 47 U.S.C.A. § 251(c)(1).[13]

When it comes to the content of those agreements, however, uniformity is not required. 47 U.S.C.A. § 252(d)(2) provides:

> (A) In general
>
> For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

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[13] "The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements." 47 U.S.C.A. § 251 (c) (1).

(B) Rules of construction

> This paragraph shall not be construed--
>
> (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or
>
> (ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

Thus, it can be seen that uniformity in the interconnectionagreements is not required. As the Eighth Circuit has noted already in the context of the Telecommunications Act,

> It is entirely possible for a state interconnectionor access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 806 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. V. Iowa Utils. Bd.*, ___ U.S. ___, 118 S. Ct. 879, 379 L. Ed. 2d. 867 (Jan. 26, 1998). Had Congress intended uniformity to be the result it could have readily achieved it by mandating comprehensive regulation. However, that would have been inconsistent with the development of competition in the local market. Clearly, Congress has devised a different scheme, which encourages the growth of competition and attendant diversity. The fact that the Act mandates a mechanism for moving to competition is not inconsistent with this effort. Congress could not wave a magic wand and produce competition overnight:

> Nor should we expect the transition to competition to be fully and voluntarily undertaken by the incumbent companies who see their "home" market positions threatened. Those companies will seek to respond in the competitive arena. That's okay. But they will also respond by testing the government's resolve to stick to a pro-competition path. Think of this as a chance for Congress and state legislatures and federal and state agencies again to be able to do the right thing. When incumbent

> monopolies hire advertising agencies and political consultants and lawyers and lobbyists to push their agendas, think of it as a chance for the people's representatives to just say no, thank you -- we insist on competition.

Reed E. Hundt, Chairman, Federal Communications Commission, *The Hard Road Ahead -- An Agenda for the FCC in 1997* (excerpt from speech delivered December 26. 1996). (Pertinent portions attached hereto as Appendix G.)

The field of telecommunications, like information services, is in a state of rapid change and development. Imposition of uniformity, and indeed expanding uniformity to encompass information services, could stifle that development. As the Eighth Circuit recently observed in the context of the FCC's handling of interstate access charges,

> The FCC explained in [its] Order that "[m]aintaining the existing pricing structure for [ISP] services avoids disrupting the still-evolving information services industry and advances the goals of the 1996 Act to 'preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.'" Order ¶ 344 (footnote omitted) (quoting 47 U.S.C.A. § 230(b)(2)).

Southwestern Bell Telephone Company v. FCC, 1998 WL 485287, at *11 (8th Cir. Aug. 19, 1998).

Determination of what the contract between BellSouth and US LEC meant, with regard to "local traffic" for which reciprocal compensation would be paid, does not require a final resolution of the issue by the FCC. It can be decided by the NCUC upon principles of ordinary contract interpretation, including the then-existing state of the law. The fact that the FCC may in the future revise its view as to how some or all Internet traffic should be treated does not, and should not control the disposition of the underlying dispute in this case.

This the 26 day of August, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document in the above-captioned action upon all parties by depositing a copy of the same in the United States mail. first-class postage prepaid, addressed as follows:

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This the 26th day of August, 1998.

James C. Gulick

James C. Gulick
Special Deputy Attorney General

PRICE REGULATIONS STRICKEN BY EIGHTH CIRCUIT COURT OF APPEALS

47 CFR	51.501	Scope.
47 CFR	51.503	General pricing standard.
47 CFR	51.505	Forward-looking economic cost.
47 CFR	51.507	General rate structure standard.
47 CFR	51.509	Rate structure standards for specific elements.
47 CFR	51.511	Forward-looking economic cost per unit.
47 CFR	51.513	Proxies for forward-looking economic cost.
47 CFR	51.515	Application of access charges.
47 CFR	51.601	Scope of resale rules.
47 CFR	51.603	Resale obligation of all local exchange carriers.
47 CFR	51.605	Additional obligations of incumbent local exchange carriers.
47 CFR	51.607	Wholesale pricing standard.
47 CFR	51.609	Determination of avoided retail costs.
47 CFR	51.611	Interim wholesale rates.
47 CFR	51.613	Restrictions on resale.
47 CFR	51.615	Withdrawal of services.
47 CFR	51.617	Assessment of end user common line charge on resellers.
47 CFR	51.701	Scope of transport and termination pricing rules.
47 CFR	51.703	Reciprocal compensation obligation of LECs.
47 CFR	51.705	Incumbent LECs' rates for transport and termination.
47 CFR	51.707	Default proxies for incumbent LECs' transport and termination rates.
47 CFR	51.709	Rate structure for transport and termination.
47 CFR	51.711	Symmetrical reciprocal compensation.
47 CFR	51.713	Bill-and-keep arrangements for reciprocal compensation.
47 CFR	51.715	Interim transport and termination pricing.
47 CFR	51.717	Renegotiation of existing non-reciprocal arrangements.

12

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of ICG Telecom Group, Inc., Complainant, v. Ameritech Ohio, Respondent. Regarding the Payment of Reciprocal Compensation.	)	Case No. 97-1557-TP-CSS

OPINION AND ORDER

The Commission, having considered the testimony and exhibits presented at the hearing in this matter, hereby issues its opinion and order.

APPEARANCES:

Muldoon & Ferris, by Boyd Ferris, 2733 West Dublin-Granville Road, Columbus, Ohio 43235, and Swidler & Berlin, by Richard M. Rindler and Michael Fleming, 3000 K Street, N.W., Washington D.C. 20007, on behalf of ICG Telecom Group, Inc., complainant.

Porter, Wright, Morris & Arthur, by Daniel R. Conway and Mark S. Stemm, 41 South High Street, Columbus, Ohio 43215-6194, and Michael T. Mulcahy, Ameritech Ohio, 45 Erieview Plaza, Suite 1400, Cleveland, Ohio 44114, on behalf of Ameritech Ohio, respondent.

OPINION:

I. Background

On November 26, 1997, ICG Telecom Group, Inc. (ICG or complainant) filed a complaint pursuant to Section 4905.26, Revised Code, and the applicable provision of the interconnection agreement (interconnection agreement or agreement) between itself and Ameritech Ohio (Ameritech or respondent) seeking enforcement of the parties' interconnection agreement entered into pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (1996 Act). The agreement was executed by the parties on June 14, 1996, and approved by the Commission in *Application for Approval of an*

Agreement between Ameritech Ohio and ICG Access Services, Inc., Case No. 96-611-TP-UNC, on September 19, 1996.

In its complaint, ICG alleges that Ameritech has breached the agreement by failing to pay ICG reciprocal compensation for the transport and termination of local exchange traffic from Ameritech end users to ICG local exchange end users that happen to be internet service providers (ISPs). Ameritech's refusal is both unreasonable and unlawful pursuant to the complaint provisions of Section 4905.26, Revised Code, ICG avers. By entry issued December 15, 1997, a prehearing conference was scheduled for January 5, 1998, to discuss, among other items, potential settlement of this matter without the need for an evidentiary hearing. The prehearing conference was held as scheduled; however, the parties were unable to reach an amicable resolution of this matter. By entry dated February 3, 1998, the examiner set this matter for evidentiary hearing to commence on February 17, 1998. Prior to the hearing, prefiled testimony was submitted on February 10, 1998, by ICG and Ameritech. On March 3, 1998, following the hearing, briefs were filed by ICG, Ameritech, and numerous *amici curiae*.[1] Reply briefs were filed on March 13, 1998. Since the closing of the briefing schedule, the parties and *amici curiae* have filed numerous notices of supplemental authority updating the Commission's record on the status of this issue throughout the country. With the receipt of the briefs and closing of the record, the case is now ready for decision by the Commission.

II. The Law

Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that:

> any rate, fare, charge, ... or service rendered, charged ... is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained.

ICG[2] and Ameritech are telephone companies as defined by Section 4905.03(A)(2), Revised Code, and public utilities by virtue of Section 4905.02, Revised Code. ICG and

---

1 *Amici curiae* briefs were filed by MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.; America Online, Inc.; The Ohio Cable Telecommunications Association; Cablevision LIGHTPATH-Ohio, Inc.; The Ohio Telecommunications Industry Association; GTE North Incorporated; and jointly by Time Warner Communications of Ohio, L.P., TCG Ohio, Brooks Fiber Communications of Ohio, Inc., and AT&T Communications of Ohio, Inc.

2 ICG was certified to provide local exchange service in Ohio in *Application of ICG Access Services, Inc. for a Certificate of Public Convenience and Necessity*, Case No. 95-814-TP-ACE, by Opinion and Order issued July 3, 1996. ICG's authority was further modified in *Application of ICG Telecom Group to Expand its Service Territory*, Case No. 96-1336-TP-AAC, on January 16, 1997.

Ameritech are, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code. In complaint proceedings such as this one, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d. 189.

III. Discussion

A. Description of ISP Traffic

Prior to discussing the merits of the parties' positions, a description of the traffic at issue in this matter is necessary. An internet service provider is a commercial or non-profit entity that provides its customers (end users) the ability to reach the internet or other on-line information services (ICG Ex. 1, at 3). The most widespread method by which an on-line service end user connects to an ISP is via the public switched telephone network or PSTN. This occurs when an end user dials a local telephone number corresponding to a telephone exchange service which the ISP has purchased from a local exchange carrier (LEC) operating in the on-line service user's local calling area (*Id.* at 4). It is the traffic corresponding to this means of connection (end user to ISP) for which Ameritech has withheld reciprocal compensation payments (*Id.* at 4). To obtain this service, an ISP purchases from the LEC standard business local exchange services, typically PBX trunks at a digital DS1 level or ISDN service. This standard business local exchange service can be purchased out of either ICG's or Ameritech's local exchange tariff (*Id.* at 4, 5). The local traffic is routed over "local intraLATA trunks" established between ICG and Ameritech pursuant to Sections 4.0 and 5.0 of the Agreement (*Id.* at 9, 10).

As an example of a scenario giving rise to this complaint, a local telephone call is initiated by an Ameritech end user which goes through an Ameritech switch to a point of interconnection established between Ameritech and ICG. The call is then handed off to ICG who routes, transports, and terminates the call to the ICG customer who is an ISP. The ISP then routes the call to the internet, a world-wide network of interconnected computers which serve as data bases and web sites for use by the end user.

B. ICG's Position

In support of its position that Ameritech has breached the agreement by failing to pay reciprocal compensation for local calls originated by Ameritech end users that terminate to ISP's on ICG's network, ICG states that the agreement clearly requires the payment of reciprocal compensation for calls billed as local traffic. Because Ameritech bills its own customers for calls to ISPs under its local tariffed rates, ICG asserts that those ISP local calls which are transported by ICG and terminated at the ISP's premise must be subject to the reciprocal compensation provisions of the agreement. ICG also observes that treating calls that terminate to ISPs as local calls is consistent with the manner in which Ameritech treats this traffic for rate, accounting, and billing purposes. On brief, ICG avers that Ameritech's reliance on the Commission's decision in *In the Matter of Ohio Direct Communications*, Case No. 95-819-TP-CSS, Opinion and Order, May 23, 1997, defies imagination. According to ICG, the *Ohio Direct* decision bears no similarity whatsoever to the instant proceeding. Moreover, during the *Ohio Direct* proceeding Ameritech strenuously argued that the operations of *Ohio Direct* were readily distinguishable from the operations of an ISP, ICG observes.

Ms. Cindy Z. Schonhaut, Senior Vice President of Government and External Affairs and principal in the negotiations between ICG and Ameritech, presented testimony on behalf of ICG which was marked as ICG Ex. 1. Ms. Schonhaut testified that at no time during the negotiation of the interconnection agreement with Ameritech did Ameritech indicate to ICG that it was unwilling to include calls to ISP's within the definition of local calls (*Id.* at 12). Further, the agreement does not provide for the exclusion of reciprocal compensation based upon the fact that a call is being terminated to an ISP (*Id.* at 13). The first clear indication to ICG that ISP traffic would not be treated to reciprocity was in a letter dated October 27, 1997, from Mr. Lamb of Ameritech in which he declared that the traffic is exchange access traffic and it is not subject to reciprocal compensation (*Id.* at 13). However, Ms. Schonhaut testified directly that by "definition a local telephone call to an ISP does not meet the definition of exchange access. In order for a call to an ISP to be an exchange access call, the information services provided by ISPs would have to be telephone toll services" (*Id.* at 14). According to the witness, this argument has been rejected by every other state public utility commission considering the issue (*Id.*).

Ms. Schonhaut further testified that, initially, following the execution and approval of the agreement by the Commission, Ameritech did pay reciprocal compensation for calls terminating at ISPs serviced by ICG. Likewise, Ameritech billed ICG for reciprocal compensation for calls to ISPs serviced by Ameritech (*Id.* at 14). At some point, Ameritech reconsidered its opinion of this billing and unilaterally revised its position. In August 1997, ICG received correspondence from Ameritech in which Ameritech, for the first time, disputed an invoice for July 1997 that ICG had sent to Ameritech. Ameritech requested that ICG verify its billing to Ameritech and exclude from that billing traffic destined to ISP customers of ICG. On October 29, 1997, Ameritech advised ICG by letter that "approximately 95.52% of ICG's Reciprocal Compensation for Ohio's billings incorrectly include traffic destined for Internet Service Providers." On a going forward basis, Ameritech unilaterally refused to pay that percentage of ICG's bills for reciprocal compensation in Ohio (Complainant Ex. A). Ms. Schonhaut testified that, at the time ICG filed its complaint in November 1997, Ameritech was in arrears to ICG in an amount exceeding one million dollars. That amount, according to the witness, increased to more than two million dollars as of the date of the hearing (ICG Ex. 1, at 15).

In her testimony Ms. Schonhaut stated that other state jurisdictions and the Federal Communications Commission (FCC) have spoken on this very issue. The FCC in its universal service order characterized the connection from the end user to the ISP as local traffic. ICG further contended that what has sometimes been referred to as the FCC's "exemption policy" was a misnomer and is not really an exemption policy because the FCC has not classified ISP's as telecommunication common carriers (ICG Ex. 1, at 17).

As a final matter, ICG contends that Ameritech's refusal to pay reciprocal compensation has significant anticompetitive implications (ICG Brief at 25). In support of this argument, ICG avers that Ameritech presently controls most of the originating traffic within its territory. Thus, a ruling in Ameritech's favor would force ICG and the other new entrant providers to terminate these ISP calls without compensation. The inevitable result being, according to ICG, that no NEC will be able to furnish service to an ISP thus leaving Ameritech with a *de facto* monopoly. This anticompetitive effect is further aggravated by the fact, according to ICG, that Ameritech is now offering its own internet access service to consumers in Ohio through a separate, wholly-owned subsidiary. By gaining monopoly power over local exchange service to ISPs coupled with the potential of increasing ISPs' costs for network access, Ameritech will be in a position to drive competing ISPs out of the local market, thereby leaving Ameritech with a *de facto* monopoly over access to the internet as well (*Id.*).

C. Ameritech's Position

Ameritech agrees that the fundamental issue in this complaint is whether internet calls from Ameritech end users routed through an ISP served by ICG to reach the internet are local calls subject to reciprocal compensation under the agreement between ICG and Ameritech. Ameritech also agrees that, under the agreement, reciprocal compensation only applies to local calls and not to exchange access calls. In order to determine whether a call should be classified as local or exchange access under the agreement, Ameritech maintains it is necessary to analyze the end-to-end characteristics of the call. Through its witnesses, Ameritech advances the position that, in fact, calls through an ISP and destined for the internet are not local calls but rather a continuous call which most often is terminated at some distant interstate or international point. In this regard, Ameritech likens an ISP call to a traditional long distance call. To make its point, Ameritech compares schematically an internet service provider call to a traditional long distance call (Ameritech Brief at 9-13). Both types of calls traverse the telecommunications network in a similar manner Ameritech maintains. This Commission has heretofore recognized, according to Ameritech, that, in order to establish the jurisdictional nature of a call, one must examine the end-to-end nature of the call. See, *Ohio Direct, supra.*

Mr. Panfil, Director of Local Exchange Competition issues for Ameritech, discussed the different services provided to an ISP (Ameritech Ex. 5 and 5a). The three different services provided by a LEC are a business local exchange service, a ISP interconnection to the PSTN, and a FGA service connection to the PSTN provided to an interexchange carrier (IXC). Mr. Panfil stated that, in each case, the service provided by the LEC "terminates" at the equipment on the premises of the business subscriber, ISP, or IXC. This termination location is generally referred to as a point-of-presence (POP). The service definition of "call termination" is the same for all three, because the service actually provided by the LEC to its customers (the business end user, the ISP, or the IXC), and for which the LEC will bill its customer, is the same. However, Ameritech contends that the meaning of call termination does not control the jurisdiction under which the LEC will provide the service to its customer, and the tariffs and other regulatory rules that will apply to the provision of that service. In order to identify the jurisdictional definition of call termination, it is necessary to know how the service is being used by the LEC's customer (*Id.* at 17).

Ameritech further contends that the scenario for an ISP is virtually identical to that of an IXC, except that internet calls are inherently interstate (eliminating the need for call-by-call analysis). When an end user's computer connects to the ISP's computer and associated network, it essentially receives a second dial tone that allows the user to address his or her data communications messages or requests using the addressing capabilities of the standard addressing protocol used on the internet. This data dial tone, according to Ameritech, allows the end user to establish a continuous connection with other computers. Ameritech states that the ISP does not merely provide access to the internet; the ISP is part of the internet (*Id.* at 19). Fundamentally, Ameritech does not agree with ICG that ISP traffic is local. Ameritech argues that the "local service calls definition" referred to in the agreement is not to distinguish local traffic from jointly provided interstate traffic such as FGA service or ISP access, but that its purpose is to distinguish local traffic from intraLATA toll traffic, for which the parties to the agreement compensate each other at different rates than for local traffic (*Id.* at 21). Regarding the numerous state decisions that are counter Ameritech's position, Ameritech contends that the decisions are contrary to past FCC precedent and that the pending FCC docket, *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CC Docket 97-30, will "inevitably" render those decisions as moot (*Id.* at 22).

There are also unwarranted financial implications, according to Ameritech, should this traffic be deemed local traffic subject to reciprocal compensation (*Id.* at 25). Due to the FCC's access charge exemption policy, handling ISP traffic is a losing proposition for all LECs, including Ameritech, because the local rate structure is not compensatory for calls with long holding times as are typical of internet calls. In support of this position, Mr. Panfil provided data in an attempt to show the financial burden imposed on Ameritech by "typical internet traffic" (*Id.*). Ameritech points out that, as a result, the overall cost of basic residential local service will be affected if reciprocal compensation must be paid for ISP calls (*Id.*). Ameritech states that the revenue imbalance will also impact the incentive for new LEC's to serve residential customers if the "market price" for residential service is substantially below the cost of providing such service and will "further retard the potential placement of new technology in the network" (*Id.*).

Ameritech contends that it never intended to treat internet calls as local traffic for purposes of reciprocal compensation (*Id.* at 2). Mr. H. Edward Wynn, at the time Vice President and General Counsel of Ameritech Information Industries Services and who served as Ameritech Ohio's principal negotiator of the agreement with ICG, testified that, based on his experiences as a telecommunications lawyer and his extensive knowledge of both the federal and the Ohio regulatory view on the nonlocal jurisdictional character of ISP traffic, he had no reason to suspect that ICG disputed the proper jurisdictional classification of such calls as switched exchange access traffic (Ameritech Ex. 1, 3-8). In its brief, Ameritech described the FCC's history regarding the treatment of ISP traffic. According to Ameritech, the FCC adopted a comprehensive access charge plan for the recovery by LECs of the costs associated with the origination and termination of interstate calls. At the time, the FCC concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations. As a result, the FCC granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.[3] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682. In 1987, the FCC in *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305, considered but refused to end the exemption from access charges for enhanced service providers.

Ameritech also disputes ICG's substantive arguments relative to the nature of ISP traffic. First, Ameritech claims that it treats calls terminated to ISPs as local calls for billing and rating purposes solely due to the FCC's access charge exemption for ISPs (Ameritech Ex. at 15). This effect is the same one that flows from Feature Group A access service arrangements. According to Mr. Panfil, in neither the ISP nor the Feature Group A situation does this have any bearing on the jurisdictional status of the underlying internet or long distance communication (*Id.*). Further, in Ameritech's view, had the FCC concluded that ISP traffic is local traffic, the FCC would not have had the authority to decide whether or not ISPs should be required to pay access charges.

In the event that this Commission decides to address the issues on the merits now and concludes that some form of compensation is required, Ameritech proposes a solution that could mitigate the impacts of any revenue shortfall (Ameritech Initial Brief at 33). That solution would be for ICG and Ameritech to pool the revenues that the internet traffic does generate and share those available revenues equitably. Ameritech's witnesses explained on cross-examination how such a measure might be devised. Those witnesses explained that the parties could model such a revenue sharing mechanism on the meet-point billing provisions that are routinely used to share access charge revenues in situations where two LECs jointly provide exchange access service to access customers. See, Tr. 103 (Wynn); Tr. 171-172 (Panfil); and Tr. 125-126 (Springsteen).

IV. Commission Analysis

The parties agree that the fundamental issue in this complaint is whether internet calls from Ameritech end users routed through an ISP served by ICG to reach the internet are local calls subject to reciprocal compensation under the interconnection

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3 The FCC recently explained that the term "enhanced service provider" includes access to the internet and other interactive computer networks. *Access Charge Reform*, CC Docket 96-262, First Report and Order, at ¶341 at note 498 (rel. May 16, 1997).

agreement between ICG and Ameritech. The parties also agree that, under the interconnection agreement, reciprocal compensation only applies to local calls and not exchange access calls. Thus, the case before us, as presented by the parties, asks us to interpret and enforce the terms of the parties agreement. This Commission's jurisdiction to interpret and enforce the terms of the involved agreement pursuant to Section 252 of the 1996 Act is not disputed. See, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (Eighth Circuit 1997).

In view of the evidence presented by the parties and the applicable precedent at the time the involved Agreement was negotiated, the Commission finds that the calls in question qualify as local traffic under the involved agreement for which Ameritech has an obligation to remit reciprocal compensation to ICG. In making this determination, we specifically note that we are deciding this case solely on our interpretation of what the parties understood at the time the Agreement was negotiated. This decision should not be viewed by anyone as an opinion on the broader policy implications involved, many of which Ameritech makes in support of its position in this matter. We also recognize that the FCC is in the process of considering arguments addressing these broader policy implications. The FCC's deliberations could, therefore, have an impact on this Commission's view of the issues presented by the parties in this complaint. We specifically reserve our rights to consider these policy implications in a future proceeding.

Turning to the gravamen of the complaint before us, we find that based upon the circumstances at the time this matter was negotiated, the most likely interpretation of what the parties intended was that the end user traffic in question was meant to be considered as local traffic and, thus, subject to reciprocal compensation. Under section 5.7.1 of the agreement, ICG and Ameritech agreed that reciprocal compensation would be paid for the termination of all local traffic, as follows:

> 5.7.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or ICG which a Telephone Exchange Service Customer originates on Ameritech's or ICG's network for termination on the other Party's network.

Under section 1.40 of the interconnection agreement, "Local Traffic means local service area calls as defined by the Commission." The Commission has defined local traffic in the Local Service Guidelines (Case No. 95-845-TP-COI [February 20, 1997]), and that definition is as follows:

> As NECs establish operations within individual ILEC service areas, the perimeter of ILEC local calling area, as revised to reflect EAS, shall constitute the demarcation for differentiating local and toll call types for the purpose of traffic termination compensation. Any end user call originating and terminating with the

> boundary of such local calling area, regardless of the LEC at the originating or terminating end, shall be treated as a local call.

The only exception to the payment of reciprocal compensation is contained in section 5.7.3 of the interconnection agreement, which states that "[t]he Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service." The interconnection agreement at section 1.56 then defines "Switched Exchange Access Service," as follows:

> [T]he offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination of termination of Telephone Toll Service. Switched Exchange Access Services include Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

The Commission can find no legal basis under this Agreement for treating ISP traffic different than other local traffic originated by an end user for purposes of reciprocal compensation. Ameritech's witnesses testified that they had no reason to believe that ICG doubted that ISP calls were exchange access calls. However, a review of the interconnection agreement reflects that the parties were very specific in indentifying services that were not subject to reciprocal compensation. Had Ameritech truly believed that ISP traffic was exchange access traffic at the time the interconnection agreement was negotiated, Ameritech should have identified it as such. Moreover, Ameritech's own actions as to how it treats end user to ISP traffic is revealing. For instance, Ameritech treats traffic to its own ISP customers as local for purposes of booking revenues, separations, and ARMIS reporting. Furthermore, the record reveals that an Ameritech end user making a similar call to an ISP served by Ameritech and within Ameritech's local calling area will not be assessed toll charges for that call.

It is also undisputed that Ameritech paid ICG reciprocal compensation for traffic to ICG ISP customers From September 1996 to October 1997. In October 1997, the record reveals that Ameritech unilaterally began to withhold reciprocal compensation due ICG. Another factor supporting our decision herein is that, during negotiation of the involved interconnection agreement, ICG requested bill and keep as the compensation methodology for local traffic compensation purposes. However, Ameritech refused bill and keep and, instead, chose reciprocal compensation based upon a minutes of use methodology. By its argument in this proceeding, Ameritech is attempting to undo what it bargained for in the negotiations involving the interconnection agreement.

We also note that this determination is in accord with existing FCC authority (*See, Access Charge Reform, Price Cap Performance Review, Transport Rate Structure and Pricing, Usage of the Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, First Report and Order, adopted May 7, 1997; released May 16, 1997) as recently affirmed by the Eighth Circuit Court of

Appeals in *Southwestern Bell Tel. Co. v. FCC*, F.3d, 1998 W.L. 485377 (8th Cir. August 19, 1998). Further, contrary to the argument raised by Ameritech, our decision in this matter does not conflict with our decision in *Ohio Direct, supra*. Ameritech cites *Ohio Direct, supra*, in order to argue that the Commission has recognized that the correct approach to determining call jurisdiction is to evaluate the end-to-end characteristics of the entire communication. We disagree. The holding in *Ohio Direct* was that the service being offered by Ohio Direct to the public qualified the company as a telephone company which had to make appropriate compensation arrangements with the involved local exchange carriers. In order to make that determination the Commission found that Ohio Direct held itself out to its customers as the provider of service, advertised its service, addressed complaints and concerns of its customers and charged a fee and collected payments for the service it rendered. In addition, the Commission found that Ohio Direct was holding itself out to end users as a common carrier for hire. The facts presented by the case now before us are clearly distinguishable from the *Ohio Direct* situation. The dispute before us in this matter is not about whether ICG should be a regulated entity nor about investigating whether a service offered by ICG would qualify as a regulated service or not. ICG is not, through the completion of a local telephone call to an ISP over the public-switched network, marketing some unique stand-alone service to end users. Also, unlike an ISP which must manipulate the transmission in order to retrieve the requested information, Ohio Direct was not engaged in any transmission manipulation.

In finding that the call to an ISP is a local call, the Commission is also in agreement with the FCC and all state commissions which, when faced with the same issue, have failed to find that internet traffic is analogous to interexchange traffic. While there is no dispute that the FCC is currently considering various issues regarding internet communications, the initiation of that proceeding provides an insufficient basis for deferring a decision here. It is possible that the FCC may reverse itself and institute some type of access charge or other compensation. However, it is also quite plausible that the FCC may conclude that the current situation, so recently affirmed by the Eighth Circuit Court of Appeals, should remain undisturbed. At this time, the overwhelming weight of FCC precedent reflects that ISPs are end users of telecommunication services provided by ILECs and competitive LECs and that calls to ISPs' local numbers are not subject to interexchange access charges. Moreover, the FCC has explicitly recognized that local calls to ISPs over the public switched telephone network are separate and distinct from the information services provided by the ISP over the packet-switched network. The FCC has stated:

> We agree with the Joint Board's determination that internet access consists of more than one component. Specifically, we recognize that internet access includes a network component, which is the connection over a LEC network from a subscriber to an internet service provider, in addition to the underlying information service.

...

> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the internet service provider's service offering.

Universal Service Order, 12 FCC at 8822.

In addition, while not binding on this Commission's determination regarding reciprocal compensation for ISP traffic, we note that, to date, state commissions in at least 20 states have similarily held when interpreting interconnection agreements that ISP traffic is local (Cablevision LIGHTPATH - OH *Amicus Curiae* Brief at 4).

V. Conclusion

In conclusion the Commission finds that, under the involved interconnection agreement, the call to the ISP by the end user of a competitive LEC or ILEC is a local call that terminates at the ISP and is, therefore, subject to reciprocal compensation. This finding is based on a contract negotiated by extremely experienced and knowledgeable parties and FCC precedent at the time this agreement was negotiated. In addition, as noted above, while not binding on the Commission for purposes of this outcome, it is instructive that every state commission to address this issue has ruled in the same manner on the issue of reciprocal compensation for ISP traffic. Accordingly, ICG has met the burden of proof required by Section 4905.26, Revised Code, and has sustained its complaint. Ameritech should reinstitute the payment of reciprocal compensation and distribute to ICG with interest, within 60 days of this order, the payments held in escrow.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On November 26, 1997, ICG Telecom Group, Inc. filed a complaint with the Commission against Ameritech Ohio, alleging that Ameritech, since July 1997, has wrongly refused to pay certain reciprocity compensation payments as required by the interconnection agreement.

(2) Pursuant to Section 4905.26, Revised Code, and Section 252(e)(1) of the Telecommunications Act of 1996, the Commission has jurisdiction to hear and determine the issues set forth in the complaint.

(3) Notice of the complaint was properly made.

(4) A hearing was held on February 17, 1998.

(5) ICG Telecom Group, Inc. has met its burden of proof.

(6) The subject calls of the complaint from ILECs and competitive LECs to ISPs are local calls and subject to reciprocal compensation as provided by the interconnection agreement.

(7) Ameritech should now pay the retained compensation held in escrow, and continue to pay the reciprocal compensation to ICG Telecom Group, Inc.

ORDER:

It is, therefore,

ORDERED, That ICG's complaint against Ameritech is granted. It is, further,

ORDERED, That Ameritech pay to ICG reciprocal compensation payments held in escrow as directed above. It is, further,

ORDERED, That a copy of this order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

WFB/JRJ;geb

Entered In The Journal
August 27, 1998

Gary E. Vigorito
Secretary

Signed By Commissioners
Glazer
Butler
Fergus
Jones
Mason (Dissenting Opinion)

ORDER NO. 96-324

ENTERED DEC 09 1996

14

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 1

In the Matter of the Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996.	)	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS AMENDED

PROCEDURAL HISTORY

On June 24, 1996, MFS Communications Company, Inc. (MFS) filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with U S West Communications, Inc. (USWC) pursuant to 47 U.S.C. §§251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act). On July 19, 1996, USWC filed a response. An arbitration hearing was held on September 24 and 25, 1996, before Thomas G. Barkin, an Administrative Law Judge for the Commission.

Standards for Arbitration

This proceeding was conducted under 47 U.S.C. § 252(b). The standards for arbitration are set forth in 47 U.S.C. § 252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252 (d)(2)(A). Arrangements that waive mutual recovery (such as bill and keep arrangements) are also allowable.

Parties' Positions. The parties reached agreement on rates for reciprocal compensation. This dispute is over the rate element to apply. MFS asserts that, until a Commission-supervised cost study has been performed, this Commission must apply the FCC's default proxy rates set forth in 47 U.S.C. §51.707. The proxy rate is the tandem rate.

The FCC does not require comparable switch functionality or cost structure, only a comparable geographic area. The MFS switch will serve customers served by the USWC Portland and Vancouver tandems and the GTE Beaverton tandem. It can serve customers in any wire center in the LATA through the purchase of unbundled transport and loops. As a result, MFS has additional costs that USWC does not face, such as very long loops, fiber rings and distributed processing.

Call termination rates should be symmetrical and based on USWC's tandem rate. If tandem rate treatment is not received for traffic terminated to MFS, the reciprocal, per minute rates should be $0.004 for end office termination and $0.006 for tandem termination, in reflection of the additional costs incurred by MFS.

USWC argues that MFS's switch is not comparable to USWC's tandem switch and therefore MFS is not entitled to symmetrical mutual compensation rates. The functions of the MFS switch are not similar to the USWC tandem switch, the costs are not symmetrical, and the geographic area served by the MFS switch is not comparable to the area served by the USWC switch. The MFS switch provides dial tone and end office switching, while a tandem switch connects trunk groups. The MFS switch will not fully serve all the customers within the geographic area. MFS confuses circumference with area. Further, MFS will not allow USWC to avoid the tandem charge by directly connecting to an MFS end office.

Arbitrator's Decision. I adopt the MFS language applying the tandem rate to transport and termination rates. Joint Position Statement, at 12. I conclude that MFS's switch qualifies for tandem rate treatment since it serves a geographic area at least as extensive as the USWC tandem switch. The tandem rate adopted in Order No. 96-283 (UM 351, Phase II) is $0.003330 per minute. This rate will remain in effect, pending Commission approval of rates for unbundled elements in compliance with the revised cost methodology adopted in UM 773. Order No. 96-284

Enhanced Service Providers

Parties' Positions. USWC seeks to exempt from the reciprocal compensation agreement all traffic originated and terminated by enhanced service providers. USWC asserts that this traffic should be subject to access charges and that the FCC will address this issue in future proceedings. MFS notes that enhanced service provider (ESP) traffic is not now subject to access charges. MFS claims the traffic from ESP providers, such as internet providers, is truly local in nature. There is no basis for treating this traffic in a unique manner on the basis of its content.

Arbitrator's Decision. I adopt the MFS proposed language in Joint Position Statement, at 12. There is no reason to depart from existing law or speculating what the FCC might ultimately conclude in a future proceeding.

Interconnection

Telecommunications Act. Every incumbent LEC has "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." 47 U.S.C. § 251(c)(2).

FCC Rules. An incumbent shall provide for interconnection at any technically feasible point within the incumbent LEC's network including, at a minimum: (i) the line-side of a local switch; (ii) the trunk-side of a local switch; (iii) the trunk interconnection points for a tandem switch; (iv) central office cross-connect points; (v) out of band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and (vi) the points of access to unbundled network elements as described in § 51.319. 47 C.F.R. § 51.305.

An incumbent LEC must accommodate two-way trunking requests where technically feasible. FCC Order ¶ 219. An incumbent LEC has the burden of demonstrating the technical unfeasibility of a particular method of interconnection or access at any individual point. FCC Order ¶ 554.

Parties' Positions. MFS asserts that USWC must make available "any method of technically feasible interconnection or access to unbundled elements at a particular point." (FCC Order ¶ 549). Interconnection at a particular point should be considered technically feasible if USWC currently provides, or has provided in the past, interconnection to any other carrier or customer at that point.

MFS should have the right to choose a desired point of interconnection unless USWC proves that significant and adverse impacts would result from the requested interconnection. FCC Order ¶ 203. As a compromise, MFS is willing to limit its choice of interconnection points by LATA. MFS's proposed language has been included in interconnection agreements with other LECs.

AT&T COMMUNICATIONS OF THE MIDWEST, INC. ISSUE DATE: December 2. 1996
MCIMETRO ACCESS TRANSMISSION SERVICES. INC.
MFS COMMUNICATIONS COMPANY
US WEST COMMUNICATIONS, INC.
DOCKET NO. P-442,421/M-96-855; P-5321.421/M-96-909; P-3167,421/M-96-729

ORDER RESOLVING ARBITRATION ISSUES

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2. Applicable Law

Same as above.

3. The Panel's Recommendation

The Panel did not make a recommendation on this issue, noting that US WEST is not seeking a universal service charge in this arbitration.

4. Commission Decision

The Commission will not issue a directive on this since the issue is not before it in this proceeding.

XIII. UNRESOLVED US WEST/MFS ISSUES

US WEST and MFS incorporated their issues into a Joint Position Statement. US WEST and MFS filed their Joint Position Statement in the form of a contract with alternative proposed language for the parties' remaining unresolved issues. US WEST and MFS requested that the Panel and the Commission resolve all remaining issues indicated so that the parties would emerge from the proceeding with a complete, final, and binding contract.

In its Exceptions to the Arbitrators' Report, MFS identified six issues that the ALJs had failed to address. The Commission will here address and resolve five of the issues. The sixth issue, implementation fees for physical and virtual collocation, has been previously addressed in this Order.

A. Exemption of Traffic to Enhanced Service Providers

1. The Issue

US WEST requests that traffic originated to and terminated by enhanced service providers (such as Internet providers) be exempted from reciprocal call termination compensation arrangements at this time. US WEST proposes that traffic between US WEST and MFS be adjusted to eliminate traffic to enhanced service providers (ESPs) until the FCC has made a final finding regarding the current exemption of ESPs from switched access charges. Without such a delay, US WEST argues, these lengthy calls could result in a traffic imbalance between US WEST and MFS.

MFS argues that there is no basis in the law to discriminate regarding reciprocal compensation arrangements on the basis of content. It is also unclear how ESP traffic could be segregated from other telecommunications traffic that is exchanged by US WEST and MFS. If US WEST wishes to pursue its proposal to require ESPs to pay switched access charges, it should follow this up in the FCC access charge reform proceeding.

2. Commission Decision

The Commission finds that US WEST has failed to meet its burden of demonstrating a need to discriminate regarding the handling of ESP traffic. US WEST does not presently have different